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Walco, Inc. v. County of Idaho Appellant's Brief Dckt. 42296

Docket No. 42296

IN THE SUPREME COURT OF THE STATE OF IDAHO

WALCO, INC.,
an Idaho Corporation

Plaintiff-Appellant,

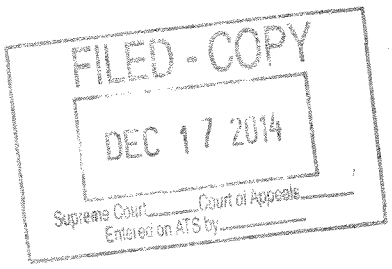
v.

COUNTY OF IDAHO,
a political subdivision of the state of Idaho;

and

SIMMONS SANITATION SERVICE, INC.,
an Idaho Corporation,

Defendant-Respondents.



ON APPEAL FROM THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF IDAHO, HONORABLE JUDGE JOHN R. STEGNER, PRESIDING

BRIEF FOR THE APPELLANT

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2. Whether the District Court erred in ruling that Walco's bid did not constitute a trade secret, thereby refusing to allow a jury to hear facts supporting the claim that Idaho County and Simmons misappropriated Walco's trade secret under I.C. §48-801(2).

IN THE SUPREME COURT OF THE STATE OF IDAHO

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BRIEF FOR THE APPELLANT

I. STANDARD OF REVIEW

This Court reviews appeals from a grant of summary judgment using the same standard as is used by the district court ruling on the motion. Summary judgment is proper "if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Teurlings v. Larson,* 156 Idaho 65, 69, 320 P.3d 1224, 1228 (2014) (citation omitted) (quoting Idaho Rule of Civil Procedure (I.R.C.P.) 56(c)). The Court construes all disputed facts in favor of the non-moving party, "and all reasonable inferences that can be drawn from the record are to be drawn in favor of the non-moving party." *Fuller v. Callister,* 150 Idaho 848, 851, 252 P.3d 1266, 1269 (2011) (quoting *Castorena v. Gen. Elec.,* 149 Idaho 609, 613, 238 P.3d 209, 213 (2010)). "If the evidence reveals no disputed issues of material fact, then only a question of law remains, over which this Court exercises free review."

Conway v. Sonntag, 141 Idaho 144, 146, 106 P.3d 470, 472 (2005).

II. STATEMENT OF THE CASE

A. Nature of the Case

Walco Inc. ("Walco") is a solid waste company based in Grangeville, Idaho. R. 11. Walco has served Idaho County and provided solid waste services for nearly 50 years. *Id.* In early 2012, Walco and Idaho County exclusively negotiated the terms for a renewal of the existing solid waste disposal contract covering the unincorporated areas of Idaho County. *Id.* However, the parties reached an impasse when Idaho County repeatedly insisted that Walco fund the County's unprofitable recycling program. *Id.* Because the parties could not negotiate a mutually beneficial renewal contract, Walco suggested that the County put the contract up for bid so as to determine, by way of market assessment, the true value of that contract. *Id.* In fall 2012, Idaho County's Board of Commissioners published a request for proposal ("RFP") regarding the solid waste contract. *Id.* The RFP was in the form of a solicitation for competitive bids and, accordingly, outlined specific requirements to be contained within a bid. R. 11, 24. In response to the RFP, only two companies submitted bids: Walco and Simmons Sanitation Service, Inc. ("Simmons"). R. 12.

Walco submitted a complete bid, in a sealed envelope, totaling 33 pages, which included the bid amount, proposed contract, a map illustrating coverage area, and a table displaying container sites, dates of trash pickup, etc. R. pp. 28-63. Importantly, Walco's bid amount took into account a fuel surcharge, and displayed that Walco had a preexisting transfer station located in Idaho County, which was required by the County in its RFP, and, in fact, is required by Idaho County Ordinance 55, Section 11, B.1. R. 13. Simmons submitted a one-page bid which was

not responsive to the County's RFP. *Id.* It was deficient for numerous reasons, including, but not limited to, the fact that it did not include an accurate fuel surcharge. During the short County Commissioner's Meeting on October 15, 2012, in which Simmons was not present, the Commissioners opened the two bids but did not make an award. Immediately following that meeting, Commissioner Skip Brandt made a series of phone calls to Robert Simmons, in which he relayed the details of Walco's bid, including its amount. During the two subsequent meetings on October 16th and 23rd, the Commissioners, along with representatives of Walco and Robert Simmons, discussed the bids. During the second meeting on October 16th, the Commissioners, realizing that Simmons' bid was incomplete, allowed Robert Simmons to rehabilitate, return, and submit a complete bid over Walco's objections that the process was unfair because the private details of their bid had already been disclosed. This was done in direct contravention to the procedure for evaluating confidential bids outlined in the County's own Request for Proposals. Ultimately, Idaho County rejected Walco's bid and elected to contract with Simmons Sanitation after Simmons had an opportunity to review Walco's proprietary pricing information and rework his bid with Walco's numbers in mind.

B. Course of Proceedings

Walco filed suit on March 25, 2013, claiming tortious interference with an expected economic advantage and misappropriation of a trade secret. Defendant Idaho County moved for summary judgment. Simmons joined that motion. In response, Walco filed its own cross motion for summary judgment. On December 20, 2013, the court heard the parties' oral arguments in support of, and in opposition to, the motions for summary judgment. The court granted Idaho County and Simmons' motions for summary judgment from the bench, ruling that a bid could not be a trade secret under Idaho law. In its motion for reconsideration, Walco pointed out that

the court had relied on incorrect law, cited by the Defendants in their reply brief, in making the ruling with regard to whether a bid could be a trade secret in Idaho. On reconsideration the court returned a decision that affirmed its grant of summary judgment to the defendants, reasoning that, although a bid could in fact be a trade secret in Idaho, Walco had not taken sufficient steps to protect it. Walco now appeals that decision because there were sufficient facts in the record to present the case to the jury as to whether or not Walco had, and took adequate steps to protect, its trade secrets.

III. ARGUMENT

A. THE DISTRICT COURT ERRED IN DETERMINING THAT WALCO'S BID DID NOT CONSTITUTE A TRADE SECRET, BECAUSE A BID CONSTITUTES A TRADE SECRET AND WALCO DID IN FACT TAKE REASONABLE STEPS TO PROTECT ITS SECRECY UNDER I.C. §48-801(5)(b).

1. Under the Idaho Trade Secrets Act, Walco's Bid Constituted a Trade Secret

The threshold issue in this case is whether a bid, here Walco's bid, constitutes a trade secret. The historical background of trade secret law in the United States demonstrates why certain information, such as a secret bid, is now considered to be a trade secret.

Prior to the passage of the Uniform Trade Secrets Act ("UTSA"), most courts referred to the First Restatement of Torts' definition of "trade secret" as guidance for determining what a trade secret was. However, Restatement §757 precluded information such as a secret bid from being a trade secret, as it narrowly required a trade secret to be "continuously used in one's business." The UTSA, published in 1979 and amended in 1985, effectively codified the basic common law principles contained in Restatement §757-759, (regarding trade secrets and trade information), and modified it to promote uniformity, fairness, and simplicity in the application of

trade secret law. *Uniform Trade Secrets Act,* 14 U.L.A. 537-40 (Commissioners' Prefatory Note)(1980). One of these modifications was to abolish the aforementioned requirement that a trade secret be continuously used in one's business. Rather, it broadened the definition to extend protection to Plaintiffs who have not yet had the opportunity or acquired the means to put the trade secret to use. The Uniform Law Commissioners summarized a trade secret as something that "basically, [is] information of commercial value. The form of that information can be exceedingly variable." Thus, while Courts still use the six factors contained within Restatement §757 to assist in determining whether information is a trade secret, the definition of trade secret itself contained within the UTSA supersedes the narrower definition in the Restatement. This Court has made it clear that, after the passage of the Idaho Trade Secrets Act, the use of the six factors are "no longer required to find a trade secret." *Basic American Inc. v. Shatila,* 133 Idaho 726, 735, 992 P.2d 175, 184 (1999). The significance to this case, then, is that the UTSA recognized that certain information, such as a secret bid or financial data that is non-recurring, once fell outside of the scope of what constituted a trade secret. Thus, seeking to promote uniformity and decrease inequitable application of trade secret law, UTSA specifically intended to incorporate information such as a secret bid into the scope of trade secret protection.

Along with 46 other states, Idaho is a Uniform Trade Secrets Act ("UTSA") jurisdiction, and as such, has incorporated the UTSA into law. I.C. §48-801 to 48-807 is known as the Idaho Trade Secrets Act ("ITSA") and, in fact, adopts the exact verbiage used by UTSA in defining what a trade secret is. I.C. §48-801 (5) defines a trade secret as follows:

> "Information, including a formula, pattern, compilation, program, computer program, device, method, technique, or process, that:
>
> (a) Derives independent economic value, actual or potential, from not being known to, and not readily ascertainable by proper means by, other persons who

(b) can obtain economic value from its disclosure or use; and;
(c) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Although Idaho lacks specific precedent on point, case law from other jurisdictions support the fact that, as a matter of law, trade secrets can be in the form of a competitive bid. In one case out of Colorado, the Plaintiff claimed that the Defendant had wrongfully used its bid amount in order to undercut it. *Ovation Plumbing v. Furton,* 33 P.3d 1221, 1223-1224 (Colo. Ct. App. 2001). Confronted with the argument that it should apply the Restatement's continuous use condition, the court reasoned: "we will not read a continuous use requirement into this statute when it does not contain such language nor any indication of legislative intent to include this concept." *Id.* In another case, the Utah Court of Appeals likewise considered that a bid constituted a trade secret. *CDC Restoration & Constr., LLC v. Tradesmen Constr., LLC* 247 P.3d 317 (Utah Ct. App. 2012). In fact, the court simply affirmed the trial court's determination that a bid "was, in fact, a trade secret," and moved on to analyze the factual issues as to whether the information from the bid was used by the Defendants. *Id.* at 327. It should be noted that, like Idaho, Utah adopted the exact verbiage from the UTSA into its statutes.

The same reasoning should be applied here. As was the case with the Colorado statutes contemplated in *Ovation Plumbing,* Idaho's Trade Secrets Act does not contain any language which could be read to incorporate a continuous use requirement. This was not an oversight; rather, it was by design. When Idaho adopted the UTSA, it accepted the UTSA Commissioners' position that a continuous use requirement may promote unfairness in the application of trade secret legislation. This is because a trade secret, being essentially information with commercial value, may come in the form of something that is non-recurring. In short, a secret bid, such as

Walco's bid to Idaho County, is the very thing that the UTSA sought to bring under the umbrella of trade secret protection.

Because the UTSA abolished the continuous use requirement from the Restatement, and Idaho adopted the UTSA into Idaho Code, Walco's secret bid, despite that it was non-recurring information, clearly qualifies as a trade secret under the ITSA.

2. A Reasonable Jury Could Conclude that Walco's Bid Constituted a Trade Secret because it had Independent Economic Value Under I.C. §48-801(5)(a).

Determining that a bid *qualifies* as a trade secret is a matter of law, whether that bid rises to the level of a trade secret is a question of fact based on I.C. §48-801(5)(a) and (b). These statutory requirements focus fundamentally on the secret nature of the information sought to be protected. However, these requirements emphasize different aspects of that secrecy. I.C. §48-801(5)(a) sets forth that the information must derive economic value as a result of its secrecy, in that the information is unknown to others who may obtain economic value from its disclosure or use. Because this is an appeal of a summary judgment determination, the central inquiry is whether a reasonable jury could conclude that Walco's bid derived independent economic value. Common sense dictates that it does.

A bid clearly derives economic value from not being known to other persons. Take for instance a slightly modified bidding scenario meant to illustrate how a bid derives economic value by virtue of its secrecy. Consider that Party 1 submits a sealed bid to the County Clerk in response to a request for proposals. It bids $100,000 plus 5% for annual adjustments. Later that day, Party 2, also interested in submitting a bid, calls the Clerk. Party 2 indicates that it is considering a bid price of $110,000, plus 6% in annual adjustments, and asks the Clerk to unseal Party 1's bid and reveal the bid amount. The Clerk obliges, and Party 2 later submits a bid for

$95,000 plus 5% for annual adjustments. Certainly, Party 1's bid had potential economic value because, had Party 2 not known its bid amount, Party 1 would have the lowest, and winning, bid. This is precisely the reason that a bid is considered a trade secret. Whether Party 1 had the lowest bid or not, the fact that it did submit its bid, and the fact that Party 2 knew the bid amount before it completed its own, means that Party 1's bid "derives independent economic value, actual or potential, from not being generally known to, and not readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use." I.C. §48-801(5)(a).

The bid submitted by Walco clearly had economic value. Without a doubt it submitted a complete bid in all respects. Simmons did not. Instead, Simmons was given Walco's information, before the Commissioners made a decision, reworked his bid and was awarded the contract as a result of the County surrendering Walco's information. Thus, it was a question of fact for the jury to decide the value of the proprietary information.

3. Based on the Facts of this Case, a Reasonable Jury Could Conclude That Walco Took Reasonable Steps, Under the Circumstances, to Protect its Secret Information.

Perhaps the most disputed issue in this case is, within the meaning of I.C. §48-801(5)(b), whether material facts exist that Walco took reasonable steps, under the circumstances, to maintain the secrecy of its bid amount. The unique circumstances surrounding this issue necessitate that a jury be allowed to determine whether the facts in the record support a finding that Walco took reasonable steps to protect its trade secret.

a. **June 7, 2012 letter communicated Walco's statutory expectation that its bid amount would be exempt from public disclosure.**

The first tangible step that Walco took to protect its trade secret came in the form of a letter sent from Walco's counsel to Idaho County Prosecuting Attorney Kirk Macgregor on June 7, 2012. In that letter, counsel for Walco expressed that it was not in Walco's best interest to contract with the County on the terms set forth by the County Commissioners. R. 187. (As mentioned previously, Idaho County and Walco were not able to agree on how the recycling program would be funded.) Rather, because the contract had not been bid on for over 40 years, Walco suggested that the contract should go out for bid. *Id.* The letter goes on to state: "with respect to Walco's proprietary information, we respectfully request that any proprietary information held by the County be retained by the County and treated as exempt under the Public Records Act." *Id.* The public records act referred to by Walco in this letter is contained within I.C. §9-340D, which states, in relevant part:

> "RECORDS EXEMPT FROM PUBLIC DISCLOSURE--TRADE SECRETS, PRODUCTION APPRASIALS, **BIDS**, PROPRIETARY INFORMATION. The following records are exempt from public disclosure:
> **(1) Trade Secrets including those contained in response to a public agency or independent public body corporate and politic requests for proposal**, requests for clarification, requests for information and similar requests."

I.C. §9-340D, part 1. (Emphasis Added.)

Thus, as the statute expressly indicates, Walco's bid is a trade secret that is exempt from public disclosure. Absent the letter, even, Walco had an expectation, based on a statutory provision, that its bid would not be disclosed. The letter, then, served as a reminder to the County that Walco desired it's proprietary information to be kept secret.

Idaho County has argued that the letter is "completely irrelevant." R. p. 1487. However, the County mischaracterizes the purpose of the letter. It argues that, because Walco knew that its bid would be opened in a public forum, and submitted it anyway, it could not have had an expectation that it would be kept secret. *Id.* However, Walco never intended the letter to communicate that it desired the bid to *never* be opened in a public forum. In fact, at the time the letter was written, the County's request for proposals had not yet been published. Rather, Walco, anticipating a bidding process in which competitors would be involved, communicated the expectation that its bid would be treated as valuable information that was not to be disclosed to those competitors who could use it to their own economic benefit. It did so because Walco expected that the bid process would be conducted in the normal, typical manner. The normal and typical manner is that the bids are opened, they are evaluated confidentially for completeness and the bid is then awarded to the lowest compliant bidder. It is only after that point that the bid information loses its' value as a trade secret.

The County also argues that the letter "did not identify <u>any</u> proprietary information." R., 1486. In fact, contrary to the County's reading of the letter, the letter specifically cites to the public records act, which defines proprietary information to include bids. Certainly, the fact that Walco did not state every piece of proprietary information it has, in order to anticipate situations in which its information may be wrongfully disclosed, cannot completely negate the fact that it has a trade secret. Put another way, the County attempts to argue that in order to protect its trade secret, Walco must also know how and when it will be misappropriated. This does not make logical sense and certainly is not a reasonable interpretation of trade secret law. From its perspective, Walco did the only reasonable thing it could do, which was to notify the County that

it had valuable proprietary information, and understood it's statutory right that that information would be treated as a trade secret.

Thus, the June 7th letter is a material fact which evidences the first reasonable step that Walco took to maintain the secrecy of its trade secret.

b. Walco submitted its bid in a sealed envelope.

The parties do not dispute that Walco submitted its bid in a sealed envelope. R. 1487. The Idaho Public Records Act does not specifically mention sealed bids, but Florida statutes provide guidance on the issue. Florida Code §119.071 provides that sealed bids and proposals submitted in response to a public agency's request for proposals are exempt from disclosure until the public agency provides notice of a decision or intended decision within 30 days after bid proposal opening, whichever is earlier. This is clearly to provide temporary protection to the bidders. The law provides protection to bidders until a bidder is chosen, to prevent discussions or alterations to bids before a decision is made. Otherwise, bidders would engage in a battle to continually undercut each other's bids until the price is so low that all bidders except for one drop out. This is tremendously inefficient and is just the type of thing Florida seeks to prevent in passing §119.071.

As previously mentioned, Idaho statutes do not have such a specific provision. However, Florida law makes it clear that bids submitted in sealed envelopes are granted certain protections by virtue of the fact that they are sealed. By inference, this seems to indicate that sealing the envelope is a sign that its contents are valuable, and the bidder does not desire the contents to be made public in a way that its contents could be used to benefit another. In conformity with this principle, and to protect its bid amount from being misappropriated, Walco sealed the envelope

in which it submitted its bid to Idaho County. As such, sealing the bid is a fact which should be presented to a jury in determining whether Walco took reasonable steps to protect its trade secret.

c. When the Idaho County Commissioners decided to allow Simmons to change his bid and re-submit it after the bids had been unsealed, Walco expressed objection to the fact its trade secret had been wrongfully disclosed

During the meeting on October 16th, after the bids had been unsealed, the Commissioners decided to allow for a separate session to allow Simmons to rehabilitate his partial, and therefore deficient, bid. Walco's representatives asserted that their bid price had been misappropriated because they quoted the entire bid price while Simmons had not, yet he was allowed to reconstruct his bid amount – with the newly acquired benefit of knowing Walco's numbers. The fact that Walco immediately objected to the unfairness of the process is evidence that they took reasonable steps to protect their trade secret.

Simmons himself clearly understood that the bid was proprietary because, when asked to give his total bid price, he insisted on an executive session claiming that his bid amount included add-ons and *was* a trade secret. The transcript of the October 16th meeting, although somewhat difficult to decipher, clearly shows that Walco objected to allowing Simmons the opportunity to come in for an executive session and rehabilitate his bid after theirs had been opened and was known to Simmons:

> **Commissioner Brandt:** Okay. Yeah. So we will continue that discussion in which we will have part of it in an executive session for Mr. Simmons. Is there any reason you folks would want to come in for an executive session? ... We have to come out to really have discussions that are not proprietary.
>
> **Mr. Holman:** As a proprietary if it's a bid he doesn't have yet. It's a bid. It's not his current numbers.

> **Mr. Simmons:** It's still my current numbers on how I operate.
>
> **Comissioner Brandt:** So we'll make this part of it executive session.
>
> (Transcripts of Commissioners Meeting, R. 1647.)

In the next session, Walco makes it clear that they object to the process as unfair, and as a result that their bid had been misappropriated:

> **Mr. Holman:** Right, but you're picking someone after our whole complete number was given. There was no question. You said—we were told we had an incomplete bid. But we have a bid you had no questions on. You don't have to ask us, oh, did you think about these gallons that you put this in? And you have one bid that said a base price, that's it.
>
> **Mr. Macgregor:** But that's what we wanted to find out. That's why we said lets have this meeting today so we can find out (inaudible).
>
> **Ms. Holman**: It's after the fact...
>
> ...
> **Ms. Holman:** And it says that you guys are going to specifically base it on the qualifications and the criteria. It says, it will be based on the four categories provided. So if we're basing it on one sheet of paper and the fact that the whole time we are being told, it's incomplete. It's incomplete. It's kind of like, okay, tell us where its incomplete. We didn't get that until Robert's (Simmons) was complete, but we're sitting here going, well what about this, this, this, and this, and asking all these questions, and he's being able to just throw numbers whatever he wants at it at the time. And the fuel—I'm sorry, but he should have had it last Monday or Tuesday, whenever you guys opened this up like that. So it's just clear – to us this just isn't a fair bid process.
>
> (Transcripts of Commissioners Meeting, R. 1693, 1697.)

What these transcripts make clear is that all parties involved treated the bids as proprietary information. Simmons refused to give his full bid amount without being in an executive session, Commissioner Brandt refers to proprietary information, and Walco repeatedly objects to the unfairness of the fact that their entire bid amount was made available to Simmons, who then got to rehabilitate his.

Thus, under the circumstances of this case, Walco took reasonable steps to maintain the secrecy of its trade secret because it immediately objected to the bid process once it became known that Simmons would be allowed to change his bid, with knowledge of Walco's full bid amount.

4. Material Facts Exist in the Record that Idaho County and Simmons Misappropriated Walco's Trade Secret.

Because Idaho County disclosed Walco's trade secret without its consent, and Simmons used the trade secret to its own advantage, when it had reason to know that the trade secret was improperly acquired, both are liable for misappropriation of a trade secret.

I.C. §48-801(2) if the ITSA defines misappropriation as follows:

> (2) "Misappropriation" means:
> (a) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or
> (b) Disclosure or use of a trade secret of another without express or implied consent by a person who:
> (A) Used improper means to acquire knowledge of the trade secret; or
> (B) At the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was:
> (i) Derived from or through a person who had utilized improper means to acquire it;
> (ii) Acquired under circumstances giving rise to

> a duty to maintain its secrecy or limit its use; or
> (iii) Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or
> (C) Before a material change of his position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

Whether misappropriation of a trade secret exists is a factual matter that should be contemplated by a jury. A jury can infer misappropriation of a trade secret through circumstantial evidence. *USA Power, LLC v. PacifiCorp,* 235 P.3d 749, 763 (Utah 2010). Consequently, "presentation of circumstantial evidence may create a genuine issue of material fact foreclosing summary judgment." *CDC Restoration & Constr., LLC v. Tradesmen Constr., LLC* 247 P.3d 317 (Utah Ct. App. 2012).

While much of the analysis to this point has necessarily focused on Walco's actions in reasonably protecting its trade secret, misappropriation focuses on the wrongful actions of both Idaho County and Simmons.

a. County Commissioner Skip Brandt intentionally and wrongfully disclosed Walco's trade secret information to Robert Simmons.

The first question is whether Idaho County acquired Walco's bid amount through improper means, and then disclosed it to Simmons. Certainly, a jury would need to weigh evidence prior to, and during, the opening of the bids. As previously mentioned, Walco and Idaho County could not agree on a renewal contract after Walco had served the County for nearly 50 years. When the funding of the County's recycling program became a sticking point in negotiations, Walco suggested that the County put the contract out for bid. This, without a

doubt, upset the Commissioners. In an email from Commissioner Brandt to Robert Simmons dated March 29, 2012, Brandt, clearly upset over Walco suggesting a bidding process, writes:

> Robert,
> You did not see this but!!!!
> They just have no fucking tact. As much as I understand when I see no give, no let's compromise, no let's talk about it, nothing; it's really hard not to instinctively tell them to shove it. They are going to pin us into a public pissing match and....$%@#$*&^()^*%*&*"

(R., 1205.)

Neither Brandt nor Simmons provided an explanation as to why they communicated in this way. Brandt and Simmons live in the same area and have known each other for years. In addition to the email referenced above, Brandt attended a meeting with Sunshine Disposal of Lewiston on July 5, 2012. R., p. 1207. During that meeting, he requested pricing information from Sunshine. They sent it to him, via email, the next day. *Id.* Within 21 minutes, he forwarded that information with the phrase "FYI," to Simmons, presumably in order to assist him in undercutting Sunshine should they elect to bid on the Idaho County Contract. *Id.*

Brandt's conduct did not end there. He continued to communicate with Simmons several times regarding the Idaho County contract. A review of text messages between the two show that they texted back and forth about the contract between October 12th, 2012 and October 17th, 2012 as follows:

10/12/2012	Brandt:	It is in.
10/13/2012	Simmons:	How mAny (sic) bids are there
10/13/2012	Brandt:	WALCO dropped on off at 4:45, so just the two.
10/13/2012	Simmons:	K

10/13/2012 Brandt: I would note that I do not no details.

10/13/2012 Simmons: K

10/17/2012 Brandt: When you get back from h c give me a call.

(R., p. 1211.)

Brandt's conduct and communications with Simmons did not end when the bids were submitted. On the day the bids were unsealed, October 15, 2012, Brandt's conduct was nothing short of astounding. Simmons did not attend that meeting, which was relatively short. Immediately following the meeting, Brandt called Simmons three times, and conversed for a total of 42 minutes. R., p. 1217. In his deposition, Brandt admitted that he and Simmons discussed Walco's bid and pricing information during the course of those phone calls:

Skip Brandt

Q: Okay. Did you have the bid in front of you --
A: Yes
Q: -- when you were having discussion with him?
A: More than likely.
Q: Were you disclosing to him information that was in this bid? And when I say this bid, I mean Walco's bid.
A: The proposal, yes.
Q: And you were sharing details with him of what was in there, correct?
A: Yes.

(Deposition of Skip Brandt. R., p.1218.)

Contrary to Brandt's recounting of the conversations he had with Simmons, Simmons himself denies that the two *ever* discussed the bid. Rather, in his deposition, Simmons steadfastly maintained that they talked only about elk hunting, even with knowledge of Brandt's testimony the day before:

Robert Simmons

Q: Skip (Brandt) testified yesterday that he was kind of flipping through Walco's bid and giving you some of the information. He didn't know if it was page by page or piece by piece, but I'm wondering if your memory is consistent with his testimony on that point.

(Risley Objection)

A: I don't remember him giving me any specific numbers off of Walco's RFP. That conversation, I know, probably stemmed from mostly hunting camp.

Q: You talked for 27 and a half minutes about hunting camp on the very day that you are getting a multi million-dollar contract?

(Stromberg Objection)
(Risley Objection)

Q: (By Mr. Charney) So go ahead and answer the question.

A: Yes. I did talk about hunting camp.

Q: For 27 and a half minutes?

A: I could—yeah I could have probably talked longer than that.

Q: Okay, and Skip's version of the events is not consistent with your version of events?

A: That's what I remember.

Q: Okay. You didn't talk one bit about Walco, the contract, Walco's numbers, what Walco was offering and not offering, nothing?

A: I do not recall that, no.

It is peculiar why Simmons was so resolute in his position that he and Brandt never discussed Walco's bid. A reasonable juror may conclude that, by virtue of his repeated denial in direct contradiction to Brandt's testimony, that Simmons believed the information he was given by Simmons was obtained improperly or illegally.

It is abundantly clear through the communications that County Commissioner Skip Brandt had with Robert Simmons that Brandt never intended to administer a fair bidding process,

no matter what the initial bid amounts were. However, the manner in which he went about it, improperly disclosing Walco's trade secret to Simmons, who apparently knew the information was not to be disclosed to him, clearly amounts to misappropriation of a trade secret under I.C. §48-801(2). These facts, outlined above, are ones that a jury should be allowed to hear in order to determine whether Walco's trade secret was misappropriated by Idaho County and Simmons.

b. Idaho County misappropriated Walco's trade secret when it knowingly refused to follow its own procedure outlined in the RFP.

Idaho County did not follow its own procedure for selecting a bid under its request for proposals ("RFP"). The RFP itself is evidence that the County had reason to know that bids were trade secrets under ITSA. Electing not to follow this process, thereby disclosing Walco's trade secret, creates liability for the County for misappropriation of Walco's trade secret.

Idaho County's own RFP indicated that the County would not be announcing bid amounts in a public setting, and most certainly not before all bids were complete. The RFP stated:

> 1. All proposals received by the submission date identified in the Notice of Request for Proposal will be catalogued and distributed for preliminary review by County staff and /or its advisors. Each proposal will be reviewed for responsiveness and completeness by COUNTY and/or its advisors. At COUNTY'S discretion, proposers may be notified by COUNTY of omissions or of the need to modify the proposal, and a schedule of provision of the missing information or issuing an amended proposal may be established by the COUNTY. (County RFP, R. 26)
>
> 2. Based on evaluation of the criteria set forth below, evaluation of the proposals found by COUNTY to satisfy minimum requirements will be conducted by COUNTY and/or its advisors. COUNTY may conduct

3. interviews to discuss or clarify aspects of proposals with some or all proposers.

(Idaho County RFP, R., 236)

As is evident from the language of the RFP, the County was to collect bids, review them for completeness, and subsequently notify bidders individually if the bid was not complete or needed clarification. Then, the County would evaluate those bids which satisfied the minimum requirements. Tellingly, the RFP did not say the bids would be opened in public, that persons submitting incomplete bids would be secretly contacted by a commissioner, that the contact would include sharing competing bidder information and that the deficient bidder could rehabilitate his bid with not only the assistance of the county, but with the numbers submitted by the competing bidder. One could reasonably read this to mean that at no time were bids to be read in public. However, at a very minimum, the RFP indicates that only proposals meeting the minimum requirements would be evaluated. In no way could a reasonable person read this to mean that all proposals would be read in public, and the ones which were not complete could be taken back, modified, and then re-submitted with a new bid amount. This is precisely what the County allowed Simmons to do in this case, to Walco's detriment.

The language contained within the RFP provides insight into what the County believed in terms of the proprietary nature of the bids. It clearly indicates that the County expected to treat bids as secret information. The procedure of notifying bidders of the need to modify their bids *prior* to evaluating the bids created a minimum requirement for ALL bidders to meet. It would be reasonably presumed that, because this was a competitive bidding process, that minimum requirement was a final bid amount, to be evaluated next to other bidders' final amounts. This procedure, created by Idaho County, operated to put them on notice that the bids were secret information, not to be shared with other bidders who could then use that information to modify

their own bids. Walco, thusly, had a reasonable expectation that the bid it submitted would not be shared publicly until all complete bids were submitted. This is an important fact that the jury should consider, along with the other facts presented above.

With regard to the ITSA definition of "misappropriation" contained within I.C. §48-801(2)(b)(B)(ii), the County's RFP gave rise to a duty to maintain the secrecy or limit the use of Walco's bid information, which was acquired by the County. Thus, the County reasonably should have known that it had a duty to maintain the secrecy of Walco's bid. It's own RFP is evidence of this.

c. Though it felt compelled to grant summary judgment to the Defendants, the District Court clearly expressed concern over the process in this case, and knowledge that its decision would be challenged.

In every hearing held regarding this case, the court did not have favorable words for Idaho County and Simmons. Judge Stegner also left the clear indication that this matter would be left to a higher court to decide, even though he himself could not find that a trade secret existed. At the first summary judgment hearing on December 20th, 2013, he stated:

> "I'm sympathetic Mr. Charney. I don't think things were run according to Hoyle as far as this process was concerned."
>
> (Tr. Vol. 1, 12/20/13, p. 50, LL. 21-23.)

In the April 7th, 2014 hearing on Walco's motion for reconsideration, the court again alluded to the difficulty he was faced with in ruling on this case:

> "I think this is one of those areas that it's going to be important for me to sit down and craft a decision and let that decision be subject to the challenges that will inevitably follow, whether that's in an appellate court or on review at some later stage. But I think it would be

> helpful to try and identify where the law is, and um, maybe its shortcomings"
>
> (Tr., 4/7/14, p. 53, LL. 14-20.)

In its final decision, the Court, once again, chastised Idaho County and Simmons for its behavior:

> "Indeed, there is evidence that one of Idaho County's Commissioners inappropriately engaged in lengthy conversations with Walco's competitor after the RFP's were unsealed and before Idaho County executed a contract with that competitor."
>
> (*Memorandum Granting Summary Judgment to Defendants*, R., 1834.)

These comments by the Court demonstrate that, while it found difficulty finding a trade secret under the facts, it clearly felt that the law, as it presently stands, does not provide remedy to Walco for the wrongful acts by Idaho County and Simmons. The court indicated that it knew the decision would be challenged, suggesting that it was a difficult decision that could have easily favored Walco as well as the Defendants. The sentiment expressed by the District Court may be indication, in and of itself, that the unique facts of this case would be best left to a jury to determine whether a trade secret existed and whether Walco took sufficient steps to protect the same.

IV. CONCLUSION

The District Court erred in determining that Walco did not have a trade secret, because it did not take reasonable steps to protect it. Walco's bid clearly constituted a trade secret under ITSA's statutory definition, and because it derived independent economic value.

Further, Walco took reasonable steps to protect its trade secret given that it had a statutory expectation under the Idaho Public Records Act, and it expressed that expectation to Idaho County. Walco also submitted its bid in a sealed envelope in response to an RFP that, by it's own language, led the reader to conclude that bid information would be kept confidential. When it became clear that their bid amount was going to be misappropriated to Simmons so that he could undercut Walco's bid, they immediately expressed that the process was flawed and that their bid was being disclosed to benefit a competitor.

With regard to misappropriation, it is clear that Idaho County should have known that Walco's bid was a trade secret by virtue of the language in its own request for proposals. Further, Commissioner Brandt's intentional and improper disclosure of Walco's bid amount to Simmons clearly fits within the breadth of I.C. §48-801(2) *et seq.* Simmons' use of that information to its own economic benefit solidifies the fact that Walco's trade secret was, in fact, misappropriated.

Walco respectfully requests that this Court reverse and remand the District Court's grant of summary judgment. Reasonable inferences, to be drawn from the facts in the record, reveal that a jury should be permitted to determine if Walco had a trade secret and if Walco took reasonable steps to protect the same.

RESPECTFULLY SUBMITTED this 17th day of December, 2014.

DENNIS M. CHARNEY
Attorney for Walco, Inc

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of December, 2014 I caused a true and correct copy of the foregoing document to be served by the method indicated below, and addressed to the following:

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